No. 12227

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

CECELIA J. WILSON,

Respondent.

BRIEF OF APPELLANT

On Appeal from the United States District Court for the District of Idaho, Eastern Division.

HON. CHASE A. CLARK, *Judge*

J. L. EBERLE,
B. S. VARIAN,
DALE O. MORGAN
T. H. EBERLE,
Boise, Idaho,
Attorneys for Appellant.

Filed.....

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SUBJECT INDEX

TABLE OF CASES AND STATUTES

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JURISDICTION AND PROCEEDINGS BELOW

This is an appeal from a judgment (T. 23) in favor of Respondent Cecelia J. Wilson and against Appellant New York Life Insurance Company for the sum of $5,553.33, plus $21.60 costs, dated March 21, 1949.

Action was commenced November 7, 1947, by complaint (T. 2) by respondent, a citizen of Idaho, against appellant, a New York corporation, to recover an additional $5,000 under the double

indemnity clause of the policy issued by appellant upon the life of respondent's husband, Harry H. Wilson, by reason of his death, allegedly caused by accidental means. Answer was filed January 31, 1948 (T. 5), and amended (T. 7-10) and after a trial by the Court, without a jury, the Court delivered opinion (T. 11-18) and thereafter made findings of fact and conclusions of law (T. 19-22) followed by judgment March 21, 1949 (T. 23-24).

Notice of appeal and supersedeas bond were filed March 28, 1948 (T. 24-25); statement of points and designation of record made March 28, 1949 (T. 28-33), and adopted April 25, 1949 (T. 175).

The statutory provision sustaining jurisdiction is Section 1291, Ch. 83, Title 28, U.S.C.

STATEMENT OF THE CASE

Appellant, New York Life Insurance Company, issued policy No. 10255251 (T. 39) dated May 19, 1928, insuring the life of Harry H. Wilson in the sum of $5,000.00, with respondent, Cecelia J. Wilson as beneficiary. For an additional quarterly premium of $1.35 there was included in said policy a double indemnity provision as follows:

> "DOUBLE INDEMNITY
>
> "The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the insured resulted directly and independently of all other causes

from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

"Double Indemnity shall not be payable if the insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

"Double Indemnity shall not apply to the temporary insurance or to the paid-up insurance provided herein under 'Surrender Values,' or to any dividend additions provided under 'Participation in Surplus-Dividends' " (T. 40).

The insured died on April 8, 1947 (T. 58). Appellant promptly paid to respondent the face amount of said policy in the sum of $5,000.00, but upon claim being made by respondent for additional sum of $5,000.00 under such double indemnity

clause, appellant denied liability therefor, and this action was commenced.

Insured had been operated upon for a bowel obstruction in 1940 (T. 52); again in 1943 for a hernia at Mayo's (T. 52-3). On April 6, 1947, he was again operated upon for a recurrent inguinal hernia (T. 53). This operation was advised by his doctor, respondent's principal witness in this case, Dr. O. F. Call (T. 79), who said there was a need for it (T. 103), at which time insured was 61 years of age (T. 53). The operation was at about 8:00 o'clock April 7, and insured died about 5:00 o'clock a.m., April 8, 1947 (T. 58).

Insured was given sedatives, the usual and ordinary procedure, to relax and induce sleep. Dr. Call, the attending physician, had been insured's doctor for many years (T. 62) and well knew of all previous operations as well as his personal habits, including that of snoring (T. 62-63). When the nurse reported loud, continuous snoring, she was assured that snoring was a common thing with insured, that he always snored (T. 63), if relaxed or asleep (T. 79-81).

The doctor also knew where there were former operations, clots occurred in lots of people (T. 83). When patient relaxed and slept, phlegm would gather as ordinary and usual result; proper procedure was coughing, which was encouraged to bring up phlegm (T. 99, 134, 145); nothing unusual in any such procedure.

Insured died within about twenty hours following the hernia operation. Respondent, however, con-

tended at the trial, and the Court found (T. 20-VI) that "he did not die as a result of hernia operation" but as a result of the sedative in connection with the operation. The insured snored and coughed, resulting in an embolism, causing his death (T. 20-21).

No allergy or hypersusceptibility to sedatives was shown; all parties were aware that insured was a pronounced snorer; the sedatives relaxed insured and induced sleep; when sleeping insured always snored; when asleep, phlegm gathers in the trachea of any patient; coughing is encouraged to prevent pulmonary congestion in any case. Trial theory, adopted by the trial Court, was that such coughing resulting from sleeping induced by a sedative, causing the breaking loose of an embolus, was accidental, although everything that occurred was normal, foreseeable and usual, and death would not have ensued had insured been free from the bodily infirmity of a thrombus or blood clot, which was liable to break loose at any time under any conditions.

Doctors Stewart, Graves, Beaman, Swindell and Pittenger testified that death resulting from post-operative embolism was foreseeable, not unexpected and not accidental (T. 142, 156-157-158, 162-163, 170). Immediately after death of insured, Dr. Call executed a death certificate which as required to include direct and contributing causes, but Dr. Call did not indicate accidental death by reason of sedatives, snoring and coughing, to which he testified a year later (T. 86).

All medical witnesses agreed that the existence of a thrombus in the insured was a bodily infirmity or venous disease (T. 88 to 90, 107, 136-137, 151).

From 50% to 80% of all post-operative deaths are due to emboli. Insured and his doctor knew of the prior operations of insured, his physical condition and snoring habits. Insured's actions during and after the operation were the same as in ordinary life (T. 115). Even a slight cough, either in or out of the hospital, might have caused his death, due to existing bodily infirmity. There was no bodily injury effected through external, violent or accidental means, and death resulting under the circumstances was not idependent of all other causes, but was manifestly contributed to, and caused by, insured's bodily infirmity and disease.

SPECIFICATION OF ERRORS

1. The Court erred in its opinion and finding (No. III, T. 20) that Harry H. Wilson died by accident or by accidental death and that such death resulted directly or indirectly of all other causes from bodily injury effected solely through external, violent and accidental means.

2. The Court erred in its opinion and finding (No. XII, T. 21) that Harry H. Wilson's death was not contributed to, or caused directly or indirectly from infirmity of body or disease, the testimony being uncontradicted showing existence of such infirmity or disease and that the same was the cause of death.

3. The Court erred in its opinion and finding (No. VII, T. 20) that Harry H. Wilson's death was caused by choking or coughing or snoring and in finding (No. VIII, T. 21) that sedatives caused the same which accidentally caused his death, and finding (No. IX, T. 21) that such snoring and coughing was not to have been foreseen and entirely beyond the experience of the attending physician, the record showing that said Harry H. Wilson had previous operations and that such snoring and coughing were no different than ordinary, and his physical condition and habits were fully known to such attending physician.

4. That the Court erred in its opinion and in its finding (No. X, T. 21) that the sedative caused violent choking, snoring or coughing, tragically out of proportion to the cause and was accidental, the record being uncontradicted and showing that such snoring, coughing and choking was normal, usual, and not disproportionate, not caused by the sedative, but normal when sleeping or relaxed, and well known to the attending physician.

5. The Court erred in failing and declining to find and hold, in accordance with the evidence, as follows:

(a) In not finding and holding that there was nothing unexpected in the snoring and coughing of Harry H. Wilson, that the same was not unusual or unforeseen, that the sedative merely produced relaxation and sleep as intended, caused no injury, and there was no uncommon or unusual reaction by reason of any allergy, hypersusceptibility, or any

other cause, that such sedative did not cause snoring, but only induced sleep, and when said Harry H. Wilson slept he always had certain snoring habits which, during and subsequent to the operation, were no different than ordinary life.

(b) In not finding and holding that the insured had an existing diseased venous system and bodily infirmity which contributed to and caused death, and that the attending physician had full knowledge of the same.

(c) In not finding and holding that post-operative pulmonary embolism is foreseeable, expected and anticipated and the natural and probable result of surgical procedure, particularly in the case of Harry H. Wilson.

6. The Court erred in concluding (Conclusion No. I, T. 22) that the death of Harry H. Wilson was accidental within the terms of the policy referred to in respondent's complaint and that appellant failed to establish death within the exclusions of said policy (Conc. II, T. 22), such conclusions being contrary to the evidence which clearly showed that respondent did not prove insured received bodily injury effected solely through accident, that such injury was a direct cause of death, independently of all other causes, and that the same was not the result, directly or indirectly, from infirmity of body or disease.

7. The Court erred in entering judgment (T. 23) in favor of respondent and against appellant in the sum of $5,553.33, plus costs of $21.20, under date of March 21, 1949.

POINTS AND AUTHORITIES

Death is not an accident, and although in most instances unexpected, to hold that all unexpected deaths are accidental and the insurer liable would put into a policy an intent never conceived by the parties to the same.

Hodges et al vs. Mut. Benefit Health and Acc. Assn. of Amer., 131 P. (2d) 937 (Wash.);
Wade vs. Pacific Coast Elevator Co., 64 Idaho 176, 129 Pac. (2d) 894.

The death certificate required by law to include cause of death, course of disease or sequence of causes resulting in death, giving primary and contributory causes and duration, is evidence of the facts therein stated and not rebutted by opinion of maker of such certificate a year later in action to recover for personal friend.

Sec. 39-207 Idaho Code;
Sec. 39-227 Idaho Code;
Hillman vs. Utah Power & Light Co., 56 Ida. 67, 51 P. (2) 730.

To recover, respondent must prove that insured's death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, and was not caused directly or indirectly by bodily infirmity or disease.

Rodia vs. Metropolitan Life Ins. Co. (Pa.), 47 A. (2) 152;
Kellner vs. Travelers Ins. Co. (Cal.), 181 P. 61;
Hutchison vs. Aetna Life Ins. Co., 189 Pac. (Ore.) 586;
Russell vs. Glens Falls Indemnity Co., 279 N.W. 287 (Neb.);
U.S. Mutual Accid. Assn. vs. Barry, 9 Sup. Ct. 755.

Where, at the time of a hernia operation, both patient and doctor knew patient had prior operations and as residue from any such operations lots of people had thrombi or blot clots, patient was heavy snorer when asleep or relaxed, that as proper procedure in such hernia operation sedatives were given to relax and induce sleep, resulting in draining of phlegm and coughing to remove the same, both of which were ordinary and usual procedure, action of patient during and subsequent to such hernia operation being the same as in ordinary life and known to patient and doctor, and even a light cough sufficient to loosen thrombus or blot clot, a pulmonary embolism following such hernia operation was not an accident or accidental and caused solely by bodily injury through accident.

Order of United Commercial Travelers vs. Nicholson, 9 F. (2) 7;
Russell vs. Glens Falls Indemnity Co., 279 N.W. 287 (Neb.);

Schroeder vs. Police and Firemens Ins. Assn. (Ill.) 21 N.E. (2d) 16;

New Amsterdam Gas Co. vs. Cora Belle Johnson (Ohio), 110 N.E. 475;

Aetna Life Ins. Co. vs. Tynan, 255 F. 483;

Amer. Nat. Insurance Co. vs. Briggs (Tex.), 90 S.W. (2d) 602;

Binder vs. Nat'l Masonic Acc. Assn. (Iowa), 102 N.W. 190;

Herthel vs. Time Ins. Co. (Wis.), 265 N.W. 575;

Hodges et al vs. Mut. Benefit Health and Acc. Assn. of Amer., 131 P. (2d) 937 (Wash.);

Howe vs. Nat'l Life Ins. Co. (Mass.), 72 N.E. (2d) 425;

Hutchison vs. Aetna Life Ins. Co., 189 Pac. (Ore.) 586;

Kellner vs. Travelers Ins. Co. (Cal.), 181 P. 61;

Kundiger vs. Metrolopitan Life Ins. Co. (Minn.), 15 N.W. (2d) 487;

Maryland Casualty Co. vs. Morrow, 213 F. 599;

Michener vs. Fidelity & Cas. Co. of N.Y. (Iowa), 203 N.W. 14;

Mutual Benefit vs. Webber (Ky.), 187 S.W. (2d) 273;

National Assn. of Ry. Clerks vs. Scott, 155 F. 92;

Preston vs. Aetna Life Ins. Co. (Ill.), 77 F. Supp. 743;

Ryan vs. Continental Casualty Co., 47 F. (2) 472;

Smith vs. Federal Life Insurance Co., 6 F. 283;

Stewart vs. Travelers Protective Assn. (Tex.), 81 F. (2d) 25;

U.S. Mutual Accid. Assn. vs. Barry, 9 Sup. Ct. 755;

Wade vs. Pacific Coast Elevator Co., 64 Idaho 176, 129 Pac. (2d) 894;

White vs. Standard Life & Accid. Ins. Co. (Minn.), 103 N.W. 735.

ARGUMENT

THE BREAKING AWAY OF A THROMBUS OR BLOOD CLOT DURING OR FOLLOWING A SEDATIVE AND SURGERY PERFORMED IN ACCORDANCE WITH USUAL AND ORDINARY PROCEDURE UNDER CONDITIONS WELL KNOWN TO ALL PARTIES IS NOT AN ACCIDENT, AND DEATH RESULTING THEREFROM WAS NOT DIRECTLY AND INDIRECTLY OF ALL OTHER CAUSES FROM BODILY INJURY THROUGH EXTERNAL VIOLENT AND ACCIDENTAL MEANS.

Respondent contended, and the Court found, that the insured died of accident, or by accidental death (T. 20, F. III), that the sedative was externally administered (T. 21, F. XI), that such sedative caused coughing, choking and snoring, unexpectedly and accidentally causing the death of the insured

(T. 21, F. VIII), and that such snoring and choking was not foreseen and beyond the experience of his attending physician (T. 21, F. IX).

These findings are not supported by the evidence. The fact is that the sedative used was the usual, ordinary and regular procedure. The effect upon the insured was the ordinary and usual effect of such a sedative and the one intended. The administering of the sedative was not an external or violent injury; it caused the insured no bodily injury. The sedative was given to allay pain, relax the body, and induce sleep and rest. This was the precise effect that it had upon the insured. There is no evidence that the sedative had any other effect. There was no uncommon or unusual reaction to the drug by reason of any allergy or hypersusceptibility to the sedative itself.

The sedative did not cause the snoring; it did nothing other than to induce sleep. The insured always snored when he slept and this fact was well known to the attending physician, respondent's chief witness, a friend and doctor of the insured for twenty years.

The nurse reported loud, continuous snoring, and Dr. Call testified:

A. Yes, sir, there is, the nurse made several reports of loud continuous snoring, more than she had heard in other cases and she was assured—

Q. What was that, Doctor?

A. She was assured that was a common thing with Mr. Wilson, that he always snored (T. 63).

Although Dr. Call made some general statements and expressed opinions upon direct examination which the Court mentioned in its opinion, the doctor was quite specific, upon cross-examination, that the insured and his doctor were well aware of the conditions involved. The doctor testified:

A. This opiate relaxed the body as a whole.

Q. This sedative you gave Mr. Wilson was proper was it?

A. Yes, sir.

Q. As a natural consequence the jaw muscles relaxed?

A. I assume it did.

Q. His mouth went open and in breathing his palate vibrated?

A. Natural snoring (T. 97).

* * * * *

Q. And labored breathing with the relaxation of the jaw muscles is not uncommon in post operative procedure?

A. In varying degrees. Some snore and others won't particularly those who snore anyway, they will snore (T. 97-8).

* * * * *

Q. His action during this operation and subsequent was no different than in ordinary life?

A. That is correct.

Q. This could have happened in bed any night?

A. Or walking down the street.

Q. It was in no way due to the fact that he was in this hospital?

A. He was quite a snorer in an operation or not in an operation (T. 115).

Thus it is clear from the evidence that the opiate did not cause any injury to the decedent and further than the snoring was unconnected with such opiate and was a natural and known tendency of the decedent while sleeping.

It is also clear from the evidence that the cough of the decedent was not caused by the opiate but was a natural consequence of the gathering of phlegm in the respiratory tract after the operation.

Q. The mucus and secretion that get down in the trachea due to the relaxation from the opiate?

A. Not that—it was mucus in the respiratory tract.

Q. Yes, and you clear that out—naturally you clear your throat when that gets down in the throat?

A. If you are not asleep.

Q. When you are asleep the natural tendency is to drain down?

A. The tendency is the same whether he is given an opiate or not. A snorer does the same thing without an opiate.

Q. In ordinary life he would do it without an opiate?

A. That's right (T. 115).

All of the doctors testified that the coughing was due to the phlegm or mucus which drained down the trachea and that there was nothing unusual or unexpected in such draining because it is a common

post-operative occurrence. Moreover, Dr. Call testified:

Q. And heavy snoring doesn't make any difference to the amount of mucus going down the trachea?

A. That is right (T. 99).

There is no dispute among the witnesses as to the proper procedure for clearing such phlegm or mucus. In other words, patients are encouraged to cough. As Dr. Brothers said: "It is good procedure to require and to cause the patient to cough up the phlegm" (T. 134). Hence, there was nothing unusual or unexpected in occurrence of the phlegm, nor in the coughing as a part of the post-operative procedure.

Dr. Call had performed one of the prior operations and knew of the other operations of the insured. He knew that under such conditions a thrombus or blood clot might well have formed. He said:

Q. How was the clot formed?

A. Due to a former operation where he had a bowel obstruction. He had this thrombus, it happens in lots of people (T. 83).

He and his associate, Dr. Brothers, knew that even a rather light cough might break such thrombus loose (T. 130).

In other words, as shown by the death certificate, there was nothing unusual or unexpected in this case. Both the doctor and the insured were aware of the fact that he was a pronounced snorer when he slept. The sedative was given to relax and induce

sleeping. The coughing was proper procedure and encouraged to avoid pulmonary congestion. With the existence of the bodily infirmity of a thrombus or blood clot, even a light cough anywhere could have caused death. The doctor, knowing of the prior operations and that lots of people, as he stated, had such infirmities as a result thereof, the actual occurrence of the breaking loose of such thrombus was as foreseeable as the fact that he would snore when he slept. The only act that was unexpected was death itself. This, however, is not the basis for any recovery in this case. As was said in the recent Washington case of Hodges et al vs. Mutual Ben. Health and Accident Assn. of America, reported in 131 P. (2d) 937:

> "True, death is in most instances unexpected, but to hold that all unexpected deaths are accidental and that insurance companies which insure against accidental death are liable on that ground would amount to a re-writing of such policies by the courts and put into each of those policies an intent that was never conceived by either the company or the insured at the time the policies were written. That, the courts cannot do. Courts may only determine the legal effect of contracts."

POST-OPERATIVE PULMONARY EMBOLISM IS NOT ACCIDENTAL AND DEATH RESULTING THEREFROM IS NOT DIRECTLY AND INDEPENDENTLY OF ALL OTHER

CAUSED FROM BODILY INJURY THROUGH EXTERNAL, VIOLENT AND ACCIDENTAL MEANS.

As stated in the case of Bennett vs. Equitable Life Assurance Society, 25 N.Y.S. (2) 799 (1939):

> "Here, however, death ensued as the result of post-operative pulmonary embolism. In such event, the cause was neither trivial nor the result unforeseen."

Although Dr. Call, respondent's principal witness, was quite positive on the stand that death, resulting from a pulmonary embolism, was accidental, it will be noted elsewhere in this brief that following the death, a year prior to his testimony, he was not certain that an embolism could be classed an accident (T. 102, 100).

Even Dr. Brothers, respondent's other witness, admitted that Dr. Call well knew the existence of the hazards and consequences involved when he operated upon insured, he testified:

Q. It is a hazard in every surgical procedure?

A. Yes, sir.

Q. It is a hazard where a surgeon operates the second time?

A. Yes, sir.

Q. He knows of the existence of the hazard?

A. Yes, sir.

Q. Not only did Doctor Call know of the existence of the hazard by reason of the first surgery,

but also he knew of the snoring and breathing proclivities of this person. He knew of that hazard?

A. I suppose that is true (T. 130).

Five other doctors testified as experts. They are the leaders in their respective fields in Idaho; internal medicine, surgery and pathology. Dr. Beeman, pathologist with a wide experience in the northwest, testified:

Q. Doctor, in your opinion is a pulmonary embolism a probable result of a hernia operation?

A. Yes, sir, a pulmonary embolism may be anticipated and expected following a hernia operation or any other abdominal surgery.

Q. Doctor, in your opinion can a pulmonary embolism come from immobilization at the time of the surgical procedure?

A. Yes, sir, for the reason that immobilization during and following surgical procedure, as well as the effect of the anesthetic tends to cause stagnation of the blood in the veins—in the venous system and this stagnation is one of the major causes of venous thrombus and venous thrombus is likewise the major cause of pulmonary embolism.

Q. Doctor, where a hernia operation has been skillfully performed, in your opinion, would a pulmonary embolism be a natural result of the immobilization incident to the surgical procedure?

A. Yes, sir.

Q. Just explain in what way such result would be a natural consequence?

A. The immobilization of the patient with resulting stagnation of blood may in itself cause

venous thrombus with resultant pulmonary embolism (T. 156).

Dr. Swindell, internist, said:

Q. In your opinion is this procedure based upon the fact that pulmonary embolism is reasonably foreseeable in any of these cases?

A. Yes, sir, I think so. Most surgeons use a measure to prevent emboli in the case of every post-operative patient.

Q. Including operations for hernia?

A. Yes, sir, including operations for hernia (T. 162).

Q. In your opinion is a post-operative pulmonary embolism accidental?

A. No, I don't think it is.

Q. Will you just state your reasons, briefly?

A. Post-operative embolism is something which surgeons think of or anticipate prior to and after surgery. They all take certain measures to reduce the chances of post-operative pulmonary embolism.

Q. Is it one of the natural consequences of every surgery or immobilization?

A. Yes, I think it is (T. 163).

He also testified:

A. Yes, sir, in that we know that a certain percentage of all surgical cases have emboli and this percentage is particularly high in the age group in which this patient falls (T. 164).

Dr. Pittenger, surgeon, testified:

Q. In your opinion, Doctor, is a pulmonary embolism accidental, is it an accident?

A. In my opinion it is not.

* * * * *

Q. It is reasonably expectable?

A. Yes, sir (T. 166).

* * * * *

Q. Doctor, isn't it a fact that fifty per cent of post-operative deaths are due to embolism?

A. Yes, that is practically correct (T. 167).

* * * * *

Q. Yould you say under those facts the pulmonary embolism was probable and to be anticipated and expected?

A. It was to be anticipated.

Q. And expected?

A. Yes, and expected (T. 167).

* * * * *

Q. And post-operative pulmonary embolism is reasonable foreseeable in the sense that it is expected?

A. Yes, they are expected.

Q. If post-operative pulmonary embolism is an accident what would you say as to other causes of death?

A. All deaths are accidental if that is true.

Q. But you don't think it is true?

A. I don't believe it is true (T. 169).

Dr. Stewart, surgeon, testified:

Q. Post-operative pulmonary embolism is something that is (131) reasonable foreseeable?

A. Yes, sir, it is foreseable (T. 170).

It is interesting to note the percentage of post-operative deaths due to embolisms.

Dr. Graves, surgeon, testified:

Q. Over fifty per cent of post-operative deaths in hernia cases are due to pulmonary embolism?

A. Yes, sir.

Q. What effect does the age group have upon the expectancy of death from pulmonary embolism in hernia operations?

A. The expectancy is much greater in older age groups.

Q. What about a person sixty-one years old, what about that age group?

A. It would be four or five times more than in the third decade (98).

Q. A surgeon would expect four or five times as great a number of embolisms in that age group than in the younger group?

A. Yes (T. 143).

Dr. Pittenger testified:

Q. Doctor, isn't it a fact that fifty per cent of post-operative deaths are due to embolism?

A. Yes, that is practically correct.

* * * * *

Dr. Stewart testified that as high as 80% of post-operative deaths were due to pulmonary or cerebral embolisms, saying:

Q. Seventy or eighty per cent of all post-operative deaths, where the operations are skilfully performed and are clean operations, are due to pulmonary embolism?

A. I should also say pulmonary embolisms or cerebral embolism (T. 172).

A DEATH CERTIFICATE UNDER THE LAWS OF IDAHO IS EVIDENCE IN ALL COURTS OF THE FACTS THEREIN STATED, AND IS NOT REBUTTED BY OPINION OF MAKER THEREOF EXPRESSED A YEAR LATER.

Sec. 39-207, Idaho Code, provides that the certificate of death shall contain, among other items, the following:

> "The cause of death, so as to show the course of disease or sequence of causes resulting in death, giving primary cause, and also the contributing causes, if any, and the duration of each."

Sec. 39-227, Idaho Code, provides that such certificate shall be prima facie evidence in all courts and places of the facts therein stated.

The Supreme Court of Idaho in the case of Hillman vs. Utah Power & Light Company, 56 Ida. 67, 51 P. (2) 730, the Court held such certificate evidence for the purpose enumerated in the statute.

It will be noted that the findings are based principally upon the testimony of Dr. Call, the main witness for respondent. He testified, and the Court found, that the insured did not die as a result of a hernia operation (T. 20, F. VI), but that death was caused by choking and snoring, resulting in an embolism (T. 20, F. VII) and that the same was accidental. This doctor's medical report, made about

a year prior thereto, in answer to the question as to whether the death was accidental, answered "Yes, providing embolism is classed as an accident" (T. 100).

This same doctor executed the death certificate also about a year prior to his testimony. He first stated that the immediate cause of death was pulmonary embolism and that its duration was sudden. Then he stated that death was due to herniorrhaphy (repair of hernia), duration, 24 hours (T. 102). Dr. Call was a practitioner of 28 years' experience (T. 62). He knew the statutory requirement and the form provided for showing the course of disease or sequence of causes resulting in death, including primary and contributing causes and duration. Dr. Call made no reference to the snoring, coughing or sedative, which he a year later testified were the cause of death. We do not believe under the circumstances he can impeach or rebutt his certificate by such opinion given a year later in the trial of a cause for the recovery of additional insurance in behalf of his close friend (T. 62).

TO RECOVER, RESPONDENT MUST PROVE, AND DID NOT, THAT INSURED'S DEATH RESULTED, DIRECTLY AND INDEPENDENTLY OF ALL OTHER CAUSES, FROM BODILY INJURY EFFECTED SOLELY THROUGH EXTERNAL, VIOLENT AND ACCIDENTAL MEANS AND WAS NOT CAUSED DIRECTLY OR INDIRECTLY, WHOLLY OR PARTLY, BY BODILY INFIRMITY OR DISEASE.

The fact that insured had a pre-existing bodily infirmity or disease is uncontradicted. Even upon respondent's theory of the case, such infirmity or disease was a contributing factor and cause of death. It will be noted that although these facts are established by respondent's witnesses, the trial Court did not even discuss the same in its opinion. Clearly the Court erred in its finding (T. 21-XII) that such infirmity was not, directly or indirectly a cause of death and that death was accidental, independent of all other causes.

The only proof respondent offered was the testimony of her two doctors, Call and Brothers. As heretofore stated, Dr. Call's testimony was that the insured had a thrombus or blood clot, a residue of one of his prior operations and that the same broke loose and caused his death. He stated that such thrombus was a pre-existing condition (T. 88). He then testified as to such condition of the venous system:

Q. The condition of the venous system is a co-existing condition with surgery, depending on that condition you have certain natural results, is that so, Doctor?

A. If you have a diseased venous system you can expect untoward results.

Q. Any condition of this system which affects a person following surgery, is a co-incident condition following surgery, is that not true?

A. That is right (T. 90).

This bodily infirmity or disease, Dr. Call then testified, was the cause of insured's death:

Q. If there was any clot that resulted in the embolism, it was certainly due to some of those operations?

A. I think it was from some of those.

Q. Then it was a condition within his body at the time of the last operation?

A. Yes, sir.

Q. It was what we could term a bodily infirmity?

A. That's right.

Q. If he had no bodily infirmity there could not have been an embolism?

A. That is pretty broad. There are embolisms that form without bodily infirmities.

Q. This was not such?

A. This was bodily infirmity.

Q. Whether you say it came from the operation performed on April 7, or whether it came from some other cause, it was from bodily infirmity?

A. Yes, sir.

Q. That was ultimately the cause of his death?

A. Yes, sir (T. 106-107).

Dr. Brothers, the only other witness, produced by respondent, likewise testified that the existence of such thrombus was a pre-existing bodily infirmity (T. 136). He also testified that such pre-existing infirmity, which reference to snoring and coughing, was the exciting cause:

Q. I think you said that the condition of his bodily infirmity with reference to the snoring and coughing was the exciting cause of the embolism?

A. Yes, sir (T. 129).

Dr. Graves, a surgeon, also testified that such thrombus, or blood clot, was a diseased process of the veins, and after explaining the reason for the same, said:

Q. Can this be designated as a disease process of the veins?

A. Of the venous system.

Q. That is co-existing at the time of the surgical procedure?

A. Yes, sir (T. 149).

Dr. Beeman, a pathologist, also testified to the diseased condition of the venous system: "In my opinion post-operative pulmonary embolism is not accidental for the reason that it arises from a diseased process of the venous system and is anticipated" (T. 158).

There is no testimony in the record contrary to that of the doctors to the effect that there was a pre-existing bodily infirmity or venous disease and that the same contributed to and was a cause of death. Respondent contended, and the trial Court found, that such pre-existing condition and venous disease resulted in an embolism, causing death. In Hutchison vs. Aetna Life Insurance Company, 189 Pac. (Ore.) 586, the rule is stated:

> "To recover death benefit under group accidental death and dismemberment policy, beneficiary must prove that death resulted, directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means, and was not

caused directly or indirectly, wholly or party, by bodily or mental infirmity."

The sedative administered was proper procedure in order to ease pain, cause relaxation, and induce sleep and rest. The effect upon the insured was precisely that intended. The sedative did not cause snoring, it induced sleep, and, as Dr. Call said: "I know that he always snored when he slept" (T. 81). This was no different than in ordinary life. Dr. Call testified that "a snorer does the same thing without an opiate" (T. 115). He then testified that insured's actions during the operation and subsequent were no different than in ordinary life (T. 115). The existence of a blood clot, due to prior operations, is not uncommon. Dr. Call testified:

Q. How was the clot formed?

A. Due to a former operation where he had a bowel obstruction.

He had this thrombus, it happens in lots of people (T. 83). Such a condition is a disease of the venous system, as pointed out by the doctors as hereinbefore mentioned. With such an infirmity, Dr. Call testified:

Q. If he coughed on the street the same thing could have happened?

A. It could have happened, where there is a preexisting thrombus (43).

Q. He could have been sitting in an arm chair and coughed and he could have died?

A. Yes, they have been known to die during the process of even giving an enema (T. 95).

Manifestly, where the experts all agree that the pre-existing condition in the case at bar was a bodily infirmity or a venous disease, death under the circumstances was not independent of other causes, but was certainly contributed to, and caused by, such infirmity or disease. In the case of Smith vs. Federal Life Insurance Company, 6 F. 283, it is held:

> "Where insured at the time he received an injury is suffering from a disease or defect which, acting with the injury as a contributing factor, causes death, or when such disease or defect aggravates the effect of the disease, and both acting together cause death, the injury is not the sole cause of death, and the death is not within the terms of a policy insuring against death effected directly and independently of all other causes through external, violent and accidental means."

To the same effect it will be noted from the testimony of Dr. Call that he seemed to be under the impression that perhaps death itself was accidental. The Supreme Court of Idaho, in the case of Wade vs. Pacific Coast Elevator Co., 64 Idaho 176, 129 P. (2) 894, held that "death is not in itself an accident."

Clearly the burden was upon respondent to establish that death was not only caused solely by acci-

dent, but also that there was no pre-existing infirmity which may have been a contributing factor, directly or indirectly causing death. Rodia vs. Metropolitan Life Insurance Co., (Pa.) 47 A. (2) 152, is a case where the policy provided inter alia for insurance "against the results of bodily injury * * *" caused directly and independently of all other causes by violent and accidental means, and that said insurance should not cover "accident, injury, disability, death or any other loss caused wholly or partly, directly or indirectly by disease or mental infirmity * * *". On page 153 the Court says:

> "Where the liability of the insurance carrier is restricted as in the policy here in controversy, it is well settled in this commonwealth that it is insufficient for plaintiff merely to show a direct causal relation between the accident and the disability or death. The burden is on her to establish the death was caused solely by external and accidental means (citing authorities). If the proof points to a pre-existing infirmity which may have been a contributing factor, plaintiff must also produce evidence to exclude the possibility" (citing authorities).

In the case of Ryan vs. Continental Casualty Co., 47 F. (2) 472, it is held:

> "Burden was on plaintiff in an action on

accident policy to prove that insured's death resulted solely from accident."

In Kellner vs. Travelers Insurance Co., (Cal.) 181 P. 61, it is held:

"In an action on an accident policy under which insurer was not responsible for the result of injuries resulting wholly or partly from disease in any form, the absence of disease contributing to death was as much part of the plaintiff's case as an affirmative showing of the occurrence of an act producing injury and of death following such injury, although insurer alleged in its answer that deceased was at the time of the accident in a diseased condition and that the disease proximately contributed to his death."

In Order of United Commercial Travelers vs. Nicholson, 9 F. (2) 7, it is held,

"Under fraternal benefit contract insuring against death by accidental means independent of other causes and not contributed to by disease, burden was on plaintiffs to prove by preponderance of evidence that member's death resulted solely from accident not contributed to by disease in any degree."

The cases involving the phraseology now under consideration are numerous and the results are

varied and contradictory. A part of this confusion is the result of failure to distinguish in drawing analogy between cases involving policies which contain only the provision "resulting, directly, independently of all other causes from bodily injury effected solely through external, violent and accidental means" and those policies which in addition contain the provision excepting from coverage, accidents where death results . . .; or directly or indirectly, from infirmity of mind or body, from illness or disease . . ."

The difference in cases under these two types of policies is very ably summarized in the Nebraska case of Russell vs. Glens Falls Indemnity Co., 279 N.W. 287, in the following passage:

> "Defendant requested the following instruction: 'You are instructed that the plaintiff in his petition alleges that the accident in question resulted in total deafness causing total disability during the period sued on. Now you are instructed that if you believe that the deafness which the plaintiff suffered after the accident was caused both by the accident and the diseased condition of plaintiff's ears, and that the diseased condition of plaintiff's ears at the time of the accident directly and indirectly, or wholly or partly, caused such total disability, as claimed by plaintiff then your verdict should be for the defendant.'
>
> "The decisions on the question set out in other jurisdictions are not uniform and are

inharmonious and in conflict, and we find by examination of the many cases cited in the briefs that any attempted reconciliation of them is hopeless and would result in absurd distinctions. In this state there is not a clearly defined rule under the previous decisions of this court. One source of confusion in the decisions on this question in different courts, even in the same jurisdiction, is in applying the reasoning and law of one case, based on a certain insurance contract providing for benefits resulting from accident, to another case with a different contract . . .

"It seems reasonably clear that a policy with the phrase 'resulting directly, independently and exclusively' refers to the efficient, substantial and proximate cause of the disability at the time it occurred. On the other hand, a policy which also has the phrase 'wholly or partly, directly or indirectly, from disease or mental or bodily infirmity' refers to another contributory cause, whether proximate or remote. To illustrate: A person might be standing near a stone wall and become dizzy and fall and receive a serious injury. Clearly there is an accident. But if the dizziness was caused by an existing illness or disease of the insured, the illness or disease would be the remote or indirect cause of the injury. It would at least in part cause the injury. It would be a contributing and co-operating cause. But, whether a proximate or remote cause, if a contributing

> cause, there can be no recovery where such a cause is excluded by the policy."

Wherever an existing disease or bodily infirmity has cooperated to produce the final result, it has ben uniformly held that there could be no recovery where the policy contained the exception clause as well as the general clause. Further, the better and majority rule, where the policy contains only the coverage provision "directly and independently of all other causes from bodily injury effected solely through violent and accidental means," is follows:

> "Where the insured at the time he received an injury is suffering from disease, bodily defects or infirmity which, acting with the injury as a contributing factor, brings about death, or when such existing disease, defect or infirmity aggravates the effect of the injury, or the injury aggravates the efforts of the disease, and both, acting together, cause death, the injury is not the sole cause of death and there there is no liability."

The following is a partial list of the cases which support the above rule:

> Preston vs. Aetna Life Ins. Co. (111), 77 F. Supp. 743;
> Michener vs. Fid. & Cas. Co. of N.Y. (Iowa), 203 N.W. 14;
> Smith vs. Fed Life Ins. Co., 6 F. (2d) 283;
> Maryland Cas. Co. vs. Morrow, 213 F. 599;

Aetna Life Ins. Co. vs. Ryan, 255 F. 483;
Nat'l Assn. of Ry. Clerks vs. Scott, 155 F. 92;
White vs. Standard Life and Accid. Ins. Co. (Minn.), 103 N.W. 735;
Binder vs. Natl. Masonic Acc. Assn. (Iowa), 102 N.W. 190;
U.S. Mut. Accid. Assn. vs. Barry, 9 Supp. Ct. 755;
Mutual Ben. Health and Accid. Assn. vs. Hite (Va.), 25 S.E. (2d) 743;
Mut. Ben. vs. Webber (Ky.) 187 S.W. (2d) 273;
Kundiger vs. Metro. Life Ins. Co. (Minn.), 15 N.W. (2d) 487;
Mut. Ben. Health and Accid. Assn. vs. Ryder (Va.), 185 S.E. 895;
Hodges vs. Mut. Ben. Health and Accid Assn. (Wash.), 131 P. (2d) 937;
Stewart vs. Travelers Prot. Assn. (Tex.), 81 F. (2d) 25;
Am. Nat. Ins. Co. vs. Briggs (Tex.), 90 S.W. (2d) 602;
Herthel vs. Time Ins. Co. (Wis.), 265 N.W. 575;
Howe vs. Nat'l Life Ins. Co. (Mass.), 72 N.E. (2d) 425.

It is clear that since the policy at hand contains the exception excluding death which results "directly or indirectly, from infirmity of mind or body, from illness or disease," that even though the

sedative was considered to have constituted an external injury, without the pre-existing thrombus death would not have resulted, and respondent cannot recover.

The manner in which the evidence was presented in an effort to establish liability in the present case is analogous to that in the Illinois case of Schroeder vs. Police & Firemen's Ins. Co., supra, we quote from that opinion:

> "A post mortem examination was held by Dr. Wheatley and Dr. Dunham, both of whom testified in the case. No cuts, bruises nor outward marks of trauma were found on the body. It was ascertained that his heart was apparently normal except for certain white calcium deposits in the upper portion thereof and in the arch of the aorta and a condition indicating arteriosclerosis, and the cause of his death was determined and reported by the physician to be angina pectoris. Upon direct examination, omitting the previous history of the case, medical testimony was given by Dr. Dunham and Dr. Wheatley in response to hypothetical questions that his death could have been caused by shock, over-exertion or excitement. On cross-examination, including the element of the previous attack of angina pectoris, both gave it as their opinion that he had died of angina pectoris. Further expert testimony was given by Dr. Robert S. McCaughey, who had examined an electro-cardiogram made on Schroeder

at the hospital in April, 1936. He testified that the cardiogram showed thrombosis and was a classical picture of blood clotting in the heart muscle, indicating angina pectoris. In answer to a hypothetical question, he stated that Schroeder had a degenerative heart circulation and that the condition might have contributed to his death. He also testified that physical exertion would likely produce death in a man who had angina pectoris.

"* * * In view of the undisputed facts appearing in the record in this case, we hold the finding of the jury was contrary to the evidence on the issues submitted. Under the facts and circumstances in evidence, we find and hold, upon a rehearing herein, that the death of William Schroeder, the insured, did not result from bodily injuries effected directly and independently of all other causes, through external, violent and accidental means, and we find that his death was caused directly or indirectly, wholly or partly, by the disease or angina pectoris and the degenerative condition of his heart from which he was suffering and that the policy of insurance does not cover such loss."

The Supreme Court of Ohio in the case of New Amsterdam Casualty Co. vs. Cora Belle Johnson, 110 N.E. 475 employed in summation of a problem before that Court, similar to the case at hand:

"In every moment of our conscious or sleeping hours we are all possible victims of errors of the human system, respiratory, circulatory, or digestive; errors that our physicians would term accidents of nature. Even the diseases which afflict humanity are frequently the result of accidents pure and simple. As has been expressively said, nature slips a cog and the well man is invalided. The separation of injuries occasioned by accidental means from those occasioned by means non-accidental is not free from difficulty, and an attempt to logically analyze every supposable case of this character and differentiate along consectary lines would lead to some contraditions.

"While the views of the laity cannot in the very nature of things be the controlling gauge wherewith to measure doubtful legal propositions, yet it might be suggested that the average business man, were the question involved in this case submitted to him, would in all likelihood be surprised, if not shocked, to learn that it had been held that an injury of the character suffered by the defendant in error should be followed by the payment of indemnity by a strictly accident insurance company.

"The Court is constrained to hold that the result which followed the taking of the bath by the insured was not an accident upon which recovery can be had under the wording of the policy. A case is cited where recovery was had by reason of a ruptured blood vessel occasioned

by the mere lifting one's self naturally out of a chair. It is felt by this Court that in such case, as in the case at bar, such a conclusion would be unduly pressing the construction of the language universally employed in naked accident policies. It would amount to an unfair and unjust enlargement of the company's liability, and would convert accident companies into both sick-beneficial and life insurance companies; and, worse than this, the apparent vice of it is that, if countenanced, it would inevitably result in the necessity of requiring constantly increasing premiums from the vast multitude of the laboring classes as well as people of moderate means who chiefly buy this character of insurance."

As noted, Dr. Call testified for respondent that the bodily infirmity had existed for many years and was of a settled and determined character. In this he was corroborated by the testimony of doctors, some of whom referred to the infirmity as a venous disease. By her own case, respondent showed that death was not caused by bodily injury through accident, independently of all other causes, but that death was contributed to and caused by such infirmity or disease.

CONCLUSION

This action to recover $5,000.00, in addition to the $5,000.00 paid by appellant in the face amount of the policy, was brought under the double indemnity clause providing for payment only in the event of death resulting directly and independently of all other causes from bodily injury effected through external, violent and accidental means. No bodily injury was shown. The sedative was proper procedure; no untoward or unexpected results ensued; it allayed pain and induced rest and sleep as it was intended; when insured slept he always snored, which was well known to attending physician, however such sleep was induced. The bodily infirmity or disease of insured was of long settled and determined character. Such infirmity, a thrombus or blood clot, a diseased venous system, could be expected to break loose at any time, either by a slight cough, walking, or other ordinary actions of life, all of which were also known. In any event, a post-operative pulmonary or other embolism, is a hazard of every surgical procedure, the great scourge occurring in about 50% to 80% of all post-operative deaths, not unforeseen, improbable or unexpected. Not only did respondent not show that death resulted directly from bodily injury solely through accident, but the record affirmatively shows a pre-existing infirmity or disease which contributed to

and caused the death of insured. Judgment should therefore be reversed.

Respectfully submitted,

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APPENDIX "A"

Sec. 39-207, Idaho Code. CERTIFICATES OF DEATH.—The certificate of death shall contain the following items:

* * * * *

17. Cause of death, including the primary and contributory causes or complications, if any, and duration of each.

Sec. 39-227. CERTIFIED COPIES AND SEARCHES FOR BIRTH AND DEATH CERTIFICATES—USE AS EVIDENCE—FEES.—The department of public health shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under the provisions of this chapter, for the making and certifica-

tion of which it shall be entitled to a fee of fifty cents, to be paid by the applicant; and any such copy of the record of a birth or death, when properly certified by the department to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated. * * *